Petition

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1980

THOMAS GANNON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Is the acceptance of small, unsolicited gratuities by a county governmental employee performing real estate settlement services proscribed by Title 12, United States Code, Section 2607(b)?
2. Were the gratuities accepted by the petitioner a portion of the charge made or received for the rendering of a real estate settlement service as contemplated by the Act?
3. Is proof of knowledge of the source of the accepted gratuities essential for a conviction under the Act?

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To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

Petitioner respectfully prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered on June 30, 1981, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, finding the petitioner guilty of violating Title 12, United States Code, Section 2607(b). He was sentenced to the custody of the Attorney General of the United States for a period of four months and fined $1,000.00.

JUDGMENT AND OPINION OF THE COURT BELOW

The judgment of the United States District Court for the Northern District of Illincis, Eastern Division, was entered on December 17, 1979, and is set forth in the Appendix. The opinion of the United States Court of Appeals for the Seventh Circuit affirming the judgment of the District Court was filed on June 30, 1981, No. 80-1108, and is not yet reported, but is set forth in the Appendix.

JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit was filed on June 30, 1981. The jurisdiction of this court is invoked pursuant to Title 28, United States Code, Section 1254(1).

STATEMENT OF THE CASE

The petitioner was charged in a twenty-nine (29) count indictment returned by the Grand Jury of the Northern District of Illinois on August 22, 1979, charging various violations of Title 12, United States Code, Section 2607(b) (R.[1]1). Count 17 of the indictment was dismissed prior to the submission of the case to the trial judge for finding (T.1:6).

The petitioner waived trial by jury (R.20), and after a bench trial he was found guilty of Counts I through

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[1] "R" refers to the Record on Appeal previously filed with the court below.
"T" refers to the Transcript of Proceedings of the trial court.

16 and 18 through 29 on December 17, 1979 per the trial judge's written memorandum opinion and order (R.24).[2]

On January 18, 1980, he was committed to the custody of the Attorney General for imprisonment for a period of four (4) months on each count to run concurrently with each other (R.27). In addition, he was fined $1,000 on each of the counts to run concurrently with each other, for a total fine of $1,000.00.

On November 3, 1980, a three judge panel of the United States Court of Appeals for the Seventh Circuit, reversed the petitioner's convictions on the grounds that the petitioner's activities were not prohibited by Title 12, United States Code, Section 2607(b).[3]

Thereafter, the Government's petition for rehearing was granted; and on June 30, 1981, following an *en banc* rehearing, the petitioner's convictions were affirmed, with two judges dissenting.[4]

STATUTES INVOLVED

Title 12, United States Code.

§2607. Prohibition against kickbacks and unearned fees.

• • •

Splitting charges

(b) No person shall give and no person shall accept any portion, split, or percentage of any charge made or

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[2] A copy of the trial judge's memorandum opinion and order is set forth in the Appendix.

[3] A copy of the opinion is set forth in the Appendix.

[4] A copy of this opinion is set forth in the Appendix. The Honorable Robert A. Grant, Senior District Judge of the Northern District of Indiana, sitting by designation on the original panel, did not participate in the *en banc* rehearing.

received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

STATEMENT OF FACTS

The petitioner was employed as a counterman in the Torrens Section of the Cook County Recorder of Deeds (T.13). The function of the Torrens Office is to guarantee title of real estate that is registered under the Torrens System (T.9). It provides real estate title certificates to the public.

In the fall of 1977, signs were placed in the Torrens section which stated: (T.11)

"ATTENTION
OFFICE REGULATIONS
PROHIBIT
MEMBERS OF THE STAFF
FROM
ACCEPTING GRATUITIES
FROM ANY SOURCE
IN THE CONDUCT OF
OFFICE BUSINESS"

A counterman is the person who accepts the documents from the public for registration under the Torrens system (T.12). These documents are incident to the transfer of real estate and are in the nature of a deed, mortgage, assignment of rents, releases, etc. (T.13). Filing fees are set by statute.

The petitioner signed a pledge in the fall of 1977 which stated: (T.22, 23, Government Exhibit No. 1)

> "The undersigned hereby acknowledge and understand that the acceptance of gratuities from any source in the conduct of office business is strictly for-

bidden. Violators of this regulation will be subject to disciplinary action."

It is a part of a counterman's job to provide prompt and courteous service to all of his customers (T.28).

Cheryl Olk, a mortgage loan closer for Harris Trust took filings to the Torrens Office and dealt with the petitioner during 1977 through the early part of 1978 (T. 37-38). She usually called for an appointment the day before the filings were to be made (T.40).

The filing fees were paid by a cashier's check in the exact amount (T.42). In addition to the filing fees, she gave the petitioner between $2.00 and $3.00 in cash on each occasion (T.43). The practice of making extra payments to the counterman was stopped at the end of October, 1977. The cash for these payments came from the bank's petty cash fund (T.44), and she characterized these payments as gratuities (T.48).

After the practice of making the extra payments ceased on October 28, 1977, things went normally with no problems (T.51). When she told the petitioner that the payments were going to stop, he told her "Fine. No problem."

Over defense objections she was permitted to testify that in March, 1978, the petitioner told her that she worked for a cheap bank and that if something wasn't done, their work wouldn't get done (T.53-55).

She gave the money to the petitioner because someone else at the bank told her to do it (T.60). The extra money given to the petitioner was not charged to the bank's customers (T.64). In exchange for the extra payment, she got prompt service and wouldn't have to stand around and wait (T.56).

Karen Leshko, also of the Harris Bank, testified that she made filings at the Torrens Office from the end of 1976 to the present time (T.67-68).

In addition to the statutory fees she paid $2.00 or $3.00 in cash to the petitioner at each filing (T.70). In return for this extra payment, she got good, prompt service (T.74).

Her supervisor told her to give the extra money to the counterman (T.78). The borrower was not charged for the money given to the petitioner (T.82).

Robert Paul Pierson made the Torrens filings for Chicago Federal Savings (T.82-83). During February, 1976, to September, 1977, he dealt with the petitioner and Frank Cincek, another counterman (T.83).

The statutory fees were paid by him in cash, and at the end of the filing, he usually gave the petitioner an extra $2.00 (T.84-85). He got service in return for the extra money that was given the petitioner (T.93). The extra money given the petitioner was not passed on to the customer (T.94). The customers were not told of the extra money given to the petitioner (T.95).

Kenneth Fleck of Chicago Federal Savings took over Torrens filings in March, 1978 (T.97). The statutory fees were paid in cash (T.98). In addition to the statutory fee, he paid a gratuity in the amount of $2.00 to the counterman at the end of the transaction (T.99). He got quick service in return for the gratuity paid to the petitioner (T.103).

The petitioner never told him to give him any cash nor did he ever have any conversations with the petitioner about the cash money he gave him (T.105). The

extra money given to the petitioner was considered a tip (T.106).

The remaining evidence was by way of stipulation of the parties as follows: (T.113-116)

> "Mr. Coulson [Assistant United States Attorney]: Your Honor, I think that we are able to stipulate to the central facts which would be elicited from the witnesses.
>
> I think that what I will do is perhaps recite into the record what those facts are and if Mr. Rotenberg [Defense Counsel] thinks that I am misstating something, I would ask that he please step up. We will resolve that. We have not reduced the stipulations to written form.
>
> The Court: Yes. Well, put that in the record. I'll appreciate that.
>
> Mr. Coulson: Each of the witnesses to be called by the government would testify that what they got in return for the extra payment was prompt service.
>
> They would each testify that it was bank money that they used to make this extra payment.
>
> * * *
>
> Mr. Coulson: . . . One of the witnesses, Mr. O'Neill, representing Crawford Savings and Loan, Counts 2 through 8, would testify that he used his own money and was regularly reimbursed by the bank after the fact.
>
> Other than that, your Honor, they will all testify that it was bank money.
>
> Each would testify that the defendant never asked for the extra money.
>
> Each would testify that they never told Mr. Gannon the source of the funds or whether or not the customer was being charged for that extra payment.
>
> Each of the witnesses would testify that he never went to the cashier's window at the Torrens Office but always tendered the payments directly to the counterman.

Now, your Honor—

The Court: Which payments? Do you mean the extra payments?

Mr. Coulson: The extra payments, all the payments; statutory as well as extra payments were always tendered to the counterman.

As to Count 1, Dominick Porro from St. Paul Federal Savings and Loan would testify that he made—that he usually went to a different counterman, went to Mr. Gannon about 30 times a year; he paid, he made the extra payments all in cash in the amount of $2 and it was done by way of a handshake with Mr. Gannon.

He did not know whether or not the buyer was charged.

As to Counts 2 through 8, Mr. O'Neill, representing Crawford Federal Savings and Loan, would testify that he paid the statutory fees by check drawn on his law office, that he paid the extra payment in cash in an envelope which was taken from his personal funds; he would testify that he is repaid by one bank check.

He would testify that he made an appointment and that he dropped files off with Mr. Gannon.

He would testify that he did not know who ultimately pays for that extra payment.

As to South Holland, that is, South Holland Trust and Savings Bank, Counts 19 through 23, Mr. Dalenberg and Mr. DeGraff would testify on behalf of that institution; they would testify that they always paid cash to the counterman and it was a lump sum payment, including the statutory fees and the extra fee. It was given at one time through the counterman.

They would testify that the extra fees were paid directly by the borrower.

As to Northwest Federal Savings and Loan, Counts 24 through 29, Mark Petricig—P-e-t-r-i-c-i-g—would testify that as to Counts 24 and 25, those were paid

all in cash at one time; that is, the statutory fees as well as the extra $2, were handed to the counterman at one time in a lump sum.

As to Counts 26, 27, 28 and 29, he would testify that he paid a check, paid by check to the counterman, for the statutory fees and that he paid the extra money in cash to the counterman and that he made these payments in groups of filings, that is, he would pay for six or seven filings at one time and the extra payment would be in an amount, for example, $12 if there were six filings.

He would testify that the money used came from the loans in process account which was paid by the customers to that particular transaction.

In addition we have the stipulation that each of the institutions named in the indictment is federally insured by either the Federal Savings and Loan Insurance Corporation or by the Federal Deposit Insurance Corporation, as indicated in the indictment."

The petitioner presented no evidence at the trial

REASONS FOR GRANTING THE WRIT

I. The Acceptance Of Small, Unsolicited Gratuities By A County Governmental Employee Performing Real Estate Settlement Services Is Not Proscribed By Title 12, United States Code, Section 2607(b).

The main issue to be resolved by this Court is whether the petitioner's conduct in accepting unsolicited gratuities in amounts ranging from $2.00 to $4.00 from persons utilizing the services of the Torrens Section of the Cook County, Illinois Recorder of Deeds Office where he was employed as a counterman is prohibited by the provisions of Title 12, United States Code, Section 2607(b).

The function of a counterman is to accept documents incident to the transfer of real estate for registration under the Torrens system so that certificates of title for real estate can be issued by the Torrens office. The fees for this service are set by statute, and the counterman receives a salary from the county.

Research has failed to disclose any other reviewing court decisions interpreting the statute under which the petitioner was convicted. Therefore, this is a case of first impression for this court.

Title 12, United States Code, Section 2607(b), provides as follows:

> §2607. Prohibition against kickbacks and unearned fees—Business referral
>
> • • •
>
> *Splitting charges*
>
> (b) No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate

> settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed."

Section 2601(a) of the Act states that Congress found that reforms in the real estate settlement process were needed to protect the consumer from "unnecessarily high settlement charges caused by certain abusive practices that have developed in some areas of the country."

The purposes of the Act are set forth in Section 2601(b) which states:

> "(b) Is is the purpose of this chapter to effect certain changes in the settlement process for residential real estate that will result—
>
> (1) in more effective advance disclosure to home buyers and sellers of settlement costs;
>
> (2) in the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services;
>
> (3) in a reduction in the amounts home buyers are required to place in escrow accounts established to insure the payment of real estate taxes and insurance; and
>
> (4) in significant reform and modernization of local recordkeeping of land title information."

From the foregoing, it is obvious that the aforesaid sections of this Act were not enacted to encompass the type of activity that is present in the case at bar, that is, the acceptance by the petitioner of unsolicited gratuities in amounts ranging from $2.00 to $4.00 from agents of the various lending institutions using the services of the Torrens office. It cannot be seriously contended that these small gratuities resulted in "unnecessarily high settlement charges" or that it was a kickback or referral

fee that tended "to increase unnecessarily the costs of certain settlement services."

That the type of activity present in the case at bar was not intended to be proscribed by the Congress in enacting this legislation is also evident from a reading of the legislative history. See the Senate Report contained in *1974 U.S. Code Cong. and Adm. News,* pages 6551-6552, wherein it is stated:

"PROHIBITION AGAINST KICKBACKS AND UNEARNED FEES

Section 7, [now Section 8, 12 U.S.C. §2607], is intended to prohibit all kickback or referral fee arrangements whereby any payment is made or 'thing of value' furnished for the referral of real estate settlement business. The section also prohibits a person or company that renders a settlement service from giving or rebating any portion of the charge to any other person except in return for services actually performed. Reasonable payments in return for services actually performed or goods actually furnished are not intended to be prohibited.

In a number of areas of the country, competitive forces in the conveyancing industry have led to the payment of referral fees, kickbacks, rebates and unearned commissions as inducements to those persons who are in a position to refer settlement business. Such payments may take various forms. For example, a title insurance company may give 10% or more of the title insurance premium to an attorney who may perform no services for the title insurance company other than placing a telephone call to the company or filling out a simple application. A discount or allowance for the prompt payment of a title insurance premium or other charge for a settlement service may be given to realtors or lenders as a rebate for the placement of the business with the individual or company giving the discount. An attor-

ney may give a portion of his fee to another attorney, lender or realtor who simply refers a prospective client to him. In some instances, a 'commission' may be paid by a title insurance company to a corporation that is wholly-owned by one or more savings and loan associations, even though that corporation performs no substantial services on behalf of the title insurance company.

In all of these instances, the payment or thing of value furnished by the person to whom the settlement business is referred tends to increase the cost of settlement services without providing any benefits to the home buyer. While the making of such payments may heretofore have been necessary from a competitive standpoint in order to obtain or retain business, and in some areas may even be permitted by state law, *it is the intention of section 7 to prohibit such payments, kickbacks, rebates, or unearned commissions.*

Subsection 7(c) makes clear that section 7 is not intended to prohibit the payment by title insurance companies, attorneys, lenders and others for goods furnished or services actually rendered, so long as the payment bears a reasonable relationship to the value of the goods or services received by the person or company making the payment. To the extent the payment is in excess of the reasonable value of the goods provided or services performed, the excess may be considered a kickback or referral fee proscribed by section 7. *Those persons and companies that provide settlement services should therefore take measures to ensure that any payments they make or commissions they give are not out of line with the reasonable value of the services received.* The value of the referral itself (i.e., the additional business obtained thereby) is not to be taken into account in determining whether the payment is reasonable.

Subsection 7(c) specifically sets forth the types of legitimate payments that would not be proscribed

by the section. For example, commissions paid by a title insurance company to a duly appointed agent for services actually performed in the issuance of a policy of title insurance would not be proscribed. Such agents, who in many areas of the country may also be attorneys, typically perform substantial services for and on behalf of a title insurance company. These services may include a title search, an evaluation of the title search to determine the insurability of the title (title examination), the actual issuance of the policy on behalf of the title insurance company, and the maintenance of records relating to the policy and policyholder. In essence, the agent does all of the work that a branch office of the title insurance company would otherwise have to perform. Similarly, the payment of a bona fide salary or other compensation for goods or facilities actually furnished or services actually performed would not be prohibited by section 7." (Emphasis Added)

The above quoted portion of the legislative history clearly establishes that the purpose of the statute in question was to prohibit a party rendering the real estate settlement service—the Torrens Office in the case at bar —from giving a portion of the charges received by it to the party utilizing its services (the lending financial institution). The attempt of the court below and the Government to extend this prohibition to the factual situation presented in the case at bar where an employee (the petitioner) of the party performing the services (Torrens Office) receives a gratuity from the party utilizing the service is unwarranted.

The examples set forth in the Senate Report also do not encompass the type of activity that was shown to have been committed by the petitioner in this case.

Title 12, U.S.C. §2617(a) provides that the Secretary of Housing and Urban Development is authorized "to

prescribe such rules and regulations, to make such interpretations, and to grant such reasonable exemptions for classes of transactions, as may be necessary to achieve the purposes of this chapter." Examples of violations of the statute are set forth in 24 C.F.R. §3500 et seq., and once again not one of these examples encompass the factual situation of the case at bar. The applicable sections of 24 C.F.R. §3500 are set forth in the Appendix of this petition (36a-39a).

The language in the case of *United States* v. *McNeive*, 536 F.2d 1245 (8th Cir. 1976) is very appropriate to the circumstances in the case at bar. The *McNeive* court stated:

> "The acceptance of small unsolicited gratuities or tips is not a bribe, kickback, an extortion or a 'scheme or artifice to defraud' under the facts of this case." 536 F.2d at page 1251.

The *McNeive* case also stated on page 1252:

> ". . . The practice of tipping others as an expression of appreciation for the performance of ministerial tasks and services is not alien to Western civilization, particularly the United States. While we sympathize with the zealous prosecutor's view in this case that tipping has no place in the administration and operation of a governmental agency, this does not transform the practice into a mail fraud violation, nor does it give the prosecutors a license to inject themselves into local affairs to attempt to rectify the problem."

See also footnote 13 on page 1252 which states:

> "Why the Government would reach out to prosecute this type of case in federal court is an enigma. In oral argument before this court, counsel for the Government informed us that McNeive's case had been discussed with state officials but the Government

had requested to prosecute this matter in a federal forum pursuant to §1341. Counsel for McNeive informed us that there was nothing to impede a state prosecution of this matter. *While we do not wish to impinge upon the sanctity of prosecutorial discretion, it seems that the Government's vast prosecutorial and investigative resources would be far better occupied if petty cases such as these were left to the province of state legal, or even political, processes.*" (Emphasis Added)

Likewise, in the case at bar, the petitioner could have been prosecuted under the provisions of Chapter 38, Section 33-3(d), Illinois Revised Statutes, which provides:

> "Official Misconduct. A public officer or employee commits misconduct when, in his official capacity, he commits any of the following acts:
>
> (d) Solicits or knowingly accepts for the performance of any act a fee or reward which he knows is not authorized by law."

Although the court below acknowledges the fact that a criminal statute must be strictly construed, *United States* v. *Campos-Serrano*, 404 U.S. 293, 297, 92 S.Ct. 471 (1971), it also stated that "a court will presume against interpreting a statute in a way that will render it meaningless or ineffective."

The construction sought by the petitioner in the case at bar will, in no way, render the statute meaningless or ineffective because it will still be effective in combating the improper conduct set forth in the examples contained in the legislative history as well as in 24 C.F.R. §3500 et seq.

However, to reach the result suggested by the court below would require an Act of Congress inasmuch as the courts cannot extend the coverage of a criminal statute

to include a type of conduct not contemplated by Congress when the statute was enacted. This court, in the case of *Pierce* v. *United States*, 314 U.S. 306, 62 S.Ct. 237, 240 (1941), made it clear that ". . . judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness."

II. The Gratuities Accepted By The Petitioner Were Not A Portion Of The Charge Made Or Received For The Rendering Of A Real Estate Settlement Service As Contemplated By The Act.

The petitioner in this cause was one of four countermen indicted separately in the United States District Court for the Northern District of Illinois, Eastern Division. The others were *United States* v. *Pawelek*, 79 CR 498; *United States* v. *Nadjari*, 79 CR 501; and *United States* v. *Snow*, 79 CR 500.

In the case of *United States* v. *Pawelek*, 79 CR 498 (N.D. Ill. 1979), the defendant, after a bench trial, was convicted by Judge Marvin Aspen of four of the thirty-five counts of the indictment. In his oral opinion,[5] Judge Aspen stated that in order to convict, the Government must prove the following elements:

1. That the defendant accepted a portion of the charges received by him.

2. That the charges were for the rendering of a real estate settlement service.

3. That the settlement service involved a federally-related mortgage loan.

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[5] A copy of Judge Aspen's oral opinion is set forth in the Appendix.

4. That the portion was other than for settlement services actually performed, and

5. That the money accepted by the defendant was a portion of the fee imposed upon the customer, and that the defendant had knowledge that he was accepting a portion of that fee.

The charges made for the real estate settlement services in the instant indictment was the statutory fee charged by the Torrens Office for the various filings. There is no question but that the Torrens Office actually received the full amount of the fee or charges that it was permitted by law to charge. The extra moneys accepted by the petitioner were in the form of unsolicited gratuities in addition to the statutory fees charged by the Torrens Office. The "charges received by him" were the statutory fees made by the Torrens Office for the rendering of the services in question. No portion of these fees was retained by him. All such fees or charges were given to the cashier of the Torrens Office, and a receipt acknowledging their payment in full was given to the party making the payments.

The fact that some of the banks passed these extra payments on to their customers (Counts 19 through 23, T.115 and Counts 24 through 29, T.116) would not constitute them as charges for real estate settlement services. Testimony as to the other counts did not show that these extra payments were eventually paid by the bank customers.

Since the extra moneys accepted by the petitioner were not a part of the charge made or received by the Torrens Office, the evidence is totally lacking as to this essential element of the charged crimes.

The court below's statement to the effect that the gratuities were as much a part of the "charge" imposed upon the customers as was the statutory fee and that the continued "prompt" service was preconditioned upon the regular payment of these "gratuities" is simply not borne out by the evidence.

All of the extra payments to the petitioner were voluntary. There was no evidence whatsoever that the petitioner ever solicited or asked for any of the gratuities received by him. In fact, there was a stipulation in the trial court that the petitioner never asked for any of the extra money.

Although witness Cheryl Olk was permitted to testify over defense objections that in March of 1978, the petitioner told her that she worked for a cheap bank and "that if something wasn't done our work wouldn't get done" (T.55), there was no showing that the work of the Harris Bank was not done as a result of their not giving gratuities to the petitioner.

In fact, the evidence was to the effect that their work was done in the same manner after the practice of giving gratuities was stopped. Miss Olk also testified that on October 28, 1977 when she told the petitioner that there would no longer be any extra payments, he told her "Fine. No problem." (T.53). She further testified that after that things went normally, and there were no problems (T.51).

Therefore, it is apparent that it was not necessary for the banks to pay the gratuities in order to get their filings done, and the payments were merely in the nature of a tip voluntarily given and were not in the nature of "charges" to the bank for processing their filings.

III. Proof Of Knowledge Of The Source Of The Gratuities Is Essential For A Conviction Under The Act.

As pointed out previously in the case of *United States* v. *Pawelek*, No. 79 CR 498 (N.D. Ill. 1979), the trial judge, in his oral opinion, stated that in order to sustain a conviction, the prosecution must prove that the extra moneys received by him were a portion of the fee imposed upon the bank's customer and that the accused *knew* that the money was being passed on to the bank's customers (34a).

Without the showing of knowledge on the part of the petitioner, the essential element of a criminal intent is lacking. That intent is an element of the charged crime is apparent from a reading of this court's opinions in the cases of *Morissette* v. *United States*, 342 U.S. 246, 72 S.Ct. 240 (1952) and *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 98 S.Ct. 2864 (1978).

There was no direct evidence presented by the Government to prove that the petitioner had knowledge that the extra moneys he was accepting were a portion of the fee imposed upon the customer nor is there any circumstantial evidence present in the record from which this essential element of knowledge may be inferred. In fact, it was stipulated at the trial that the petitioner was not told the source of the gratuities received by him nor was he told whether or not the customer was being charged for the extra payments received by him (T.114).

Furthermore, the only counts for which the evidence showed that the banks passed these extra payments on to their customers were Counts 19 through 23 (T.115) and Counts 24 through 29 (T.116). Notwithstanding the lack of proof as to this essential element, the petitioner's con-

victions on all counts of the indictment were affirmed by the court below.

In support of this petition, the petitioner also adopts those matters set forth in the opinion of the original panel of the court below filed on November 3, 1980 (18a) and the dissenting opinion of the *en banc* opinion (12a).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

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APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 80-1108

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

THOMAS GANNON,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 79 CR 499-1—BERNARD M. DECKER, *Judge.*

Argued En Banc February 19, 1981—Decided June 30, 1981

Before FAIRCHILD, *Chief Judge,* SWYGERT, CUMMINGS, PELL, SPRECHER, BAUER, WOOD, and CUDAHY, *Circuit Judges.*

PELL, *Circuit Judge.* Appellant Thomas Gannon was convicted of 29 counts of violating The Real Estate Settlement Procedures Act of 1974, 12 U.S.C. §§ 2601, 2607(b) (1976) (RESPA), by accepting payments for Torrens filings which were in excess of those authorized by state law. Each extra payment was the basis of a separate count of the indictment. Appellant, a counterman in the Torrens section of the Cook County, Illinois Recorder of Deeds office, acknowledged that he received and accepted the excess payments from local bank representatives whose filings he had handled. He claims, however, that RESPA does not apply to these payments because they were "gratuities," not "portions of the charges" made for settlement services "other than for services actually performed." 12 U.S.C. § 2607(b). A

panel of this Court initially agreed with appellant's interpretation and reversed his conviction. *United States* v. *Gannon*, No. 80-1108 (7th Cir., Nov. 3, 1980). This opinion follows an *en banc* rehearing.

I

The undisputed evidence presented at appellant's trial reveals the following. The purpose of the Torrens section is to guarantee the title of Cook County real estate registered with it by issuing title certificates for the property. The counterman deals directly with the public by accepting land registration and transfer documents, examining the documents for correctness, transmitting the documents to other employees so that a new title certificate can be prepared if necessary, and charging and accepting the appropriate fees for these services. The fees are set by state statute and the countermen receive a salary in return for which they are to provide the public with prompt and courteous service.

Since the fall of 1977, a sign has been displayed in the Torrens section which states:

ATTENTION

OFFICE REGULATIONS PROHIBIT MEMBERS OF THE STAFF FROM ACCEPTING GRATUITIES FROM ANY SOURCE IN THE CONDUCT OF OFFICIAL BUSINESS.

In addition, in the fall of 1977, appellant signed a typed statement which provides:

> The undersigned hereby acknowledges and understands that the acceptance of gratuities from any source in the conduct of office business is strictly forbidden. Violators of this regulation will be subject to disciplinary action.

A number of the section's customers are employees of various local banks or savings and loan institutions. The institutions are federally insured and use the Torrens

services in the course of providing real estate loans. The bank employees can either phone ahead to the Torrens office for an appointment with a specific counterman, or can arrive at the office without an appointment and wait in a line for service. They can pay for the Torrens service either in cash or by check which is given to the counterman in return for a stamped receipt.

A number of bank employees testified at appellant's trial that when they submitted the relevant documents and fees to appellant for Torrens registration or transfer, they gave two or three dollars to appellant in addition to the statutory amount. It is uncontested that appellant accepted these extra payments. The employees testified that they were told by their superiors, usually during training, that they should regularly make these additional payments to the countermen. Although there was no testimony that appellant requested or solicited these extra payments, one of the bank employees, Cheryl Olk, testified that after she ceased making the payments for her bank, appellant told her that she worked for a "cheap bank" and that if "something were not done," the bank's "work would not get done."[1] All of the bank employees testified that in return for the additional payments, they believed that they received "prompt" and good service from appellant.

II

The basis of this appeal is that these extra payments were unsolicited "gratuities," which, although they may have violated state statutes or office regulations, did not violate RESPA because they were not the evil § 2607(b) was intended to address.

Section 2607 provides in pertinent part:

> §2607. Prohibition Against Kickbacks And Unearned Fees

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[1] Initially upon being informed that Olk's bank would cease making the payments, appellant said, "Fine. No problem," and for a period of time Olk's filings were handled "normally."

—Business Referral

(a) No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

—Splitting Charges

(b) No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

—Fees, Salaries, Compensation, Or Other Payments

(c) Nothing in this section shall be construed as prohibiting . . . (2) the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed. . . .

Appellant makes two arguments in support of his contention that § 2607(b) was not intended to apply to his actions. First, he claims that the gratuities were not a "portion" of the "charge made . . . for the rendering of real estate settlement services." Second, he contends that he performed real estate settlement services in return for the gratuities.

Regarding appellant's first argument, we must initially recognize the findings made by the district court that the "gratuities were a regular portion of the payments for the rendering of settlement services," and that the "[a]gents of the banks were given the impression that gratuities had to be paid in order to get the work done." Appellant claims that these comments were not formal factual findings requiring the application of the "clearly erroneous" standard. We disagree with appellant's characterization, however, irrespective of the standard applied,

it appears the "comments" were adequately supported in the record.

To come within the scope of § 2607's prohibitions, a charge need not be imposed pursuant to a state statute or local regulation, or even be the result of a specific demand by the counterman. HUD regulations provide that an "agreement or understanding" for the referral of business that is illegal under § 2607(a)

> need not be verbalized but may be established by practice, pattern, or course of conduct pursuant to which the payor and the recipient of the thing of value understand that the payment is in return for the referral of business.

24 C.F.R. § 3500.14(c) (1980). We think a similar definition should be imposed upon the term "charge" in subsection (b). *See Weiner* v. *Swales*, 141 A.2d 749, 750 (Md. Sup. Ct. 1958) ("charges" are "the expenses which have been incurred, or disbursements made, in connection with a contract, suit, or business transaction"). In this case, it is clear that the two- or three-dollar gratuities were as much a part of the "charge" imposed upon the customers as was the statutorily imposed segment. It is a reasonable inference from the evidence that in general, the continued "prompt" service was preconditioned upon the regular payment of these "gratuities." The inference is buttressed by the testimony regarding the training information passed to the institutions' employees which reflects that the custom of paying the "gratuities" was well established in the business community.[2] Any remaining doubt concerning the deontic nature of the extra payments was put to rest by appellant's statement to Olk that if her bank did not "do something" about the cessation of

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[2] The conclusion that the practice was wide-spread is further supported by the fact that the Government has secured the conviction of several other countermen for violating § 2607 (b) by accepting these extra payments. *United States* v. *Pawelek*, No. 70 CR 498 (N.D. Ill. 1979); *United States* v. *Snow*, No. 70 CR 500 (N.D. Ill. 1979); *United States* v. *Nadjari*, No. 70 CR 501 (N.D. Ill. 1979).

the "gratuity" payments, the bank's work "would not get done."

Regarding appellant's second argument, appellant concedes that in return for his salary from the Torrens office, it was his obligation to render *all* customers prompt and good service, and that the reasonable value of the services he rendered was equal to the statutory portion of the "charges" he imposed. Therefore, appellant must have accepted the extra payments for something other than rendering his settlement services. Appellant cannot avoid liability under § 2607(b) simply by refusing to perform his mandated duties unless he is given a "gratuity," and thus claiming that he was "performing a real estate settlement service" in return for the extra payments.

The difficulty the panel focused upon in the original opinion concerned the construction of the phrase "received for." In essence, the panel concluded that it would be impossible for a single individual to violate § 2607(b) because he could not both accept a portion of the charge "*received for*" the rendering of real estate settlement services, and also accept the same charge "*other than for* services actually performed." If the services were not performed, the panel held, the charge could not have been received "for" the performance of those services. We think this construction of § 2607(b) is too restrictive.

Although it is true that, in general, a criminal statute must be strictly construed, *United States* v. *Campos-Serrano*, 404 U.S. 293, 297 (1971) (citation omitted), it is also a well established rule of statutory construction that a court will presume against interpreting a statute in a way that will render it meaningless or ineffective. *FTC* v. *Manager, Retail Credit Co., Miami Branch Office*, 515 F.2d 988, 994 (D.C. Cir. 1975) (citations omitted). In this case, not only does the panel's interpretation conflict with what we believe was the Congressional intent behind § 2607, but it also renders the statute ineffective in achieving even what the appellant contends is the more narrow Congressional intent.

Appellant claims that Congress did not intend § 2607 (b) to apply to additional payments such as the one at issue in this case. Rather, he argues that the statute was intended to apply only to the practice some real estate companies had of splitting the charges they received for performing real estate settlement services with individuals who performed no service for the company's customers in return. This split was usually intended to serve as compensation for the referral of business. Appellant relies in this argument on the subtitle of subsection 6(b), "Splitting Charges," upon the examples in the legislative history of § 2607 and the HUD regulations interpreting the section. Both of these latter sources do, in fact, discuss only splitting scenarios and we fully agree with appellant that the splitting arrangement was foremost in Congress' mind when it enacted RESPA and specifically § 2607(b). We disagree, however, that § 2607 (b) was intended to deal with that problem exclusively.

Notwithstanding the examples in the legislative history and the regulations, the overall purpose of § 2607 was set forth more broadly in Senate Report No. 93-866, May 22, 1974, which reported out of committee the bill that eventually became § 2607. That report succinctly stated that one of the purposes of the bill was "to eliminate the payment of . . . unearned fees in connection with settlement services provided in federally related mortgage transactions, and for other purposes . . . ," 1974 U.S. Code Cong. & Ad. News 6546, 6548, 6554, and characterizes subsection (b) as prohibiting the "acceptance of *any* portion of *any* charge for the rendering of a real estate settlement service other than for services actually performed." *Id.* at 6556 (emphasis added). While the title of a section of a statute should not control or vary the plain meaning of the statute itself, nevertheless the title of § 2607, "Kickbacks and Unearned Fees," appears to fortify the position that the Congressional intent was for a broader application than that ascribed to it by the appellant. Congress' aim was to stop *all* abusive practices that unreasonably inflate federally related settlement costs to the public. *Id.* at 6547, 6548. Al-

though the focus of immediate Congressional concern may have been the splitting of fees between the recipient of the charge and unrelated third parties, the arrangement we view here is no less an example of an "abusive practice" or imposition of an "unearned fee," unreasonably increasing the cost of settlement services to the banks, and ultimately to the public at large. As stated previously, appellant concedes that the reasonable value of the services he rendered was equal to the statutory portion alone of the "charge" he levied. It should be noted in this regard that the Senate report stated: "To the extent that the payment is in excess of the reasonable value of the . . . services performed, the excess may be considered a kickback or referral fee proscribed by section 7 [§ 2607]." *Id.* at 6551.

At best, the *bank employees* were receiving a benefit in the form of expedited service. The cost for this service, however, was ultimately being paid by the bank's customers in return for a benefit that at most could be described as speculative or tangential. We think this conduct was within the Congressional concern manifested by § 2607(b). The fact that appellant kept the entirety of the extra payments instead of passing a portion of them along to an unrelated third party does not, in our opinion, render his conduct less abusive or insulate him from liability under that statute.

Given the Congressional goal of protecting the public from abusive practices that unreasonably inflate settlement costs, we see no reason to overturn the district court's construction of § 2607(b) that achieves this objective. We believe a single individual *can* violate § 2607(b) by receiving in his official capacity a "charge" for the rendering of settlement services, but personally keeping a portion of the charge in fact for something other than the performance of those services. In this case, appellant in his official role imposed and received a "charge" that incorporated not only a statutorily imposed segment, but also a "gratuity" that was ostensibly required by appellant in order to get the services properly per-

formed. At the same time, because the prompt service was already due the bank employees under state law once the statutory fee was paid, the extra payment must have been accepted in fact for something "other than services actually performed." This conduct violated § 2607(b). The panel's construction of the statute has an additional difficulty. Even if we were to assume a more narrow Congressional intent behind § 2607, that is, an attack solely upon the "splitting" situations, the panel's construction would not achieve Congress' desired result. The two-party scenario, no less than the one-party situation we review here, is a potential victim to a construction that technically defines the phrase "receive for." In the two-party situation, the real estate company employee, or counterman, would receive a "charge" for the performance of real estate settlement services." However, because he would pass along a portion to a third individual who did nothing for the customer in return, neither the total charge nor the portion passed along would be within the panel's narrow definition of § 2607(b). Because nothing was performed for the customer in return for at least part of the charge, that portion of the charge could not have been received "for" the performance of real estate settlement services. The remaining portion, on the other hand, *would* have been received in return for the services; yet that portion would also not be subject to § 2607 because actual services were performed in its return. Under the panel's construction, therefore, the statute would be rendered meaningless, except possibly in those rare instances where the unreasonably inflated charge is officially sanctioned. We do not believe such a construction is desirable or necessary in this case and thus adopt the district court's construction which achieves Congress' intent.[3]

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[3] The only district judges that have addressed the question of whether or not § 2607(b) applies to this situation are in accord with our interpretation. *United States* v. *Pawelek*, No. 70 CR 498 (N.D. Ill. 1979); *United States* v. *Snow*, No. 70 CR 500 (N.D. Ill. 1979); *United States* v. *Nadjari*, No. 70 CR 501 (N.D. Ill. 1979).

II

Appellant also challenges § 2607 as being unconstitutionally vague. Although it is true that a statute which sets forth its provisions in terms so vague that individuals "of common intelligence must necessarily guess at its meaning . . . violates the first essential of due process of laws," *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926), we do not find that this principle has any application here. Our interpretation of § 2607(b) is a logical application of the Congressional policies underlying RESPA, *see United States* v. *Chiarella*, 588 F.2d 1358, 1369 (2d Cir. 1978), *rev'd on other grounds*, 445 U.S. 222 (1980), and the fact that no prior case has involved the precise fact situation we address here is not dispositive. All that is necessary is that a "clear and definite statement of the conduct proscribed antedate" the action alleged to be criminal. *United States* v. *Persky*, 520 F.2d 283, 288 (2d Cir. 1975). We hold that this standard was met in this case.

"In determining the sufficiency of the notice a statute must of necessity be examined in light of the conduct with which the defendant is charged." *United States* v. *National Dairy Products Corp.*, 372 U.S. 29, 33 (1963); *diLeo* v. *Greenfield*, 541 F.2d 949 (2d Cir. 1976). "Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his conduct is proscribed." *National Dairy*, *supra* at 32-33 (citation omitted). In this case, appellant certainly knew from the sign in the Torrens office and the statement he signed that his practice of accepting the extra payments was improper and that the extra payments were not "bona fide." Thus, he cannot claim that he was unfairly surprised that his conduct was illegal, only that it was proscribed under this specific statute. It is well established, however, that in light of the strong presumption of validity that attaches to Acts of Congress, the fact that individuals may differ regarding whether or not certain marginal offenses fall within a specific statute's terms does not by itself render the statute

unconstitutional. *Id.* at 32. Furthermore, this case has not presented any potential for discretionary enforcement of the statute, nor have the facts shown that the statute has been arbitrarily or discriminatorily invoked. *Int'l Society for Krishna Consciousness, Inc.* v. *Rochford,* 585 F.2d 263, 267 (7th Cir. 1978). We find, therefore, that § 2607(b) is sufficiently definite to pass constitutional muster.

III

Appellant next challenges the sufficiency of the Government's evidence, claiming that the Government failed to prove that the "gratuities" were actually paid by the bank's customers, and that it failed to prove that appellant knew that the extra payments were paid by the bank's customers.

Regarding appellant's first complaint, the Government established that many of the extra payments were passed on directly to the bank's customers, and when the evidence is viewed most favorably to the Government, *Glasser* v. *United States,* 315 U.S. 60, 80 (1942), it is a reasonable inference that the remaining payments also were passed on to the customers at least indirectly. Furthermore, appellant has failed to support his implication that the banks, when they were representing their customers, were not themselves members of the "public" as that term is used in the legislative history of § 2607.

As to the second element of appellant's argument, we have found no support in the legislative history for the contention that the Government's burden in a § 2607 prosecution includes a showing that appellant *knew* that each payment was being passed on directly to the bank's customers. *Contra, United States* v. *Pawelek,* No. 79 CR 498 (N.D. Ill. 1979). Congress' intent was to make illegal any abusive practice that unreasonably inflated the cost of real estate settlement services to the public. The fact that appellant may not have had knowledge as to whether or not specific payments were passed on directly to the bank's customers does not render his acceptance of the

extra payments less abusive, or have a bearing upon whether or not the bank's customers eventually bore an increased and unwarranted cost. Because the ultimate source of the bank's funds was its customers, a sense of realism alone should have informed appellant that the customers would eventually bear the cost of the extra payments. We hold this is sufficient to meet any degree of knowledge required under § 2607(b).

IV

Appellant's final challenge is based upon the disparity between the sentences imposed upon him and the other countermen in related prosecutions. *See Pawelek, supra, Snow, supra,* and *Nadjari, supra.* This court will not infringe upon the trial court's discretion in sentencing absent a clear showing of gross abuse of that discretion. *United States* v *Mitchell,* 625 F.2d 158, 162 (7th Cir. 1980), *cert. denied,* 101 S. Ct. 402. A sentence generally will not be reviewed if it is within the statutory limits, *id.*; *United States* v. *Dorzynski,* 418 U.S. 424, 440-41 (1974) (citations omitted), and "disparity in sentences is not a predicate for appellate review." *United States* v. *Amick,* 439 F.2d 351, 371 (7th Cir. 1971), *cert. denied,* 403 U.S. 918. The record in the instant case reveals that the trial judge was fully aware of the other RESPA sentences and considered only the facts of the case before him. The sentence also was within the statutory limitations of RESPA. In these circumstances, we will not disturb the district court's discretion.

AFFIRMED.

CUDAHY, *Circuit Judge,* dissenting, in which SWYGERT, *Circuit Judge,* joins:[1]

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[1] The panel to which the majority refers as having originally decided this case consisted of Circuit Judges Swygert and Cudahy and Senior District Judge Robert A. Grant of the Northern District of Indiana, sitting by designation. The panel decision was unanmious.

From all appearances, Gannon may be guilty of accepting bribes or perhaps of committing acts of extortion. From all appearances, he should be charged under an appropriate rule or statute. Unfortunately, the plain language of RESPA precludes his being legitimately prosecuted under that statute.

At trial in this case the Government argued that in addition to scienter, it must prove the following elements to establish that Gannon violated Section 2607:

> (1) that the defendant accepted a portion of the charges received by him.
>
> (2) that the charges were for the rendering of a real estate settlement service,
>
> (3) that the settlement involved a federally related mortgage loan and
>
> (4) that the portion was other than for settlement services actually performed.

Government's Trial Memorandum of November 29, 1979, pp. 9-10 and Appellee's Brief, p. 21. The Government has argued throughout that these elements are requisite, and the majority accepts this position.

But merely to recite these elements is to demonstrate conclusively the irrationality of the Government's position. On the one hand, the Government recognizes in elements (1) and (2) that it must prove that the money Gannon kept for himself ('accepted") was part of funds he received for rendering a specific service (a real estate settlement service). But in element (4) the Government indicates it must somehow prove that the money ("portion") the defendant kept for himself was "other than for settlement services actually performed." Thus the position of the Government and of the majority here is logically inconsistent and indefensible because the money Gannon accepted must, in reality, either be part of the charges he received for settlement services rendered or be "other than" the charges for settlement services rendered. But these two categories are mutually

exclusive; the money cannot be both part of and "other than" such charges.

The majority attempts to evade this very fundamental problem by asserting that the "reasonable value" of Gannon's services was equal to only the statutory portion "of the 'charge' he levied." Majority Op. at 6, 8. But what the "reasonable value" of the services might have been is, under the circumstances here, wholly irrelevant. The majority's assertion merely restates the legal conclusion that the charge for Torrens service set by law is by definition "reasonable." The majority is simply left to argue that the excess payment or "reasonable value" is a payment for some additional unspecified and unidentified "something." Majority Op. at 6. This analysis is really consistent *in economic terms* only with the absurd conclusion that the excess over "reasonable value" is a pure gift (presumably generously conferred on Gannon by the banks).[2] But the facts of the matter are quite different. For the banks in fact decided that *more* than the statutory fee *had* to be paid in order to obtain satisfactory and "prompt" service. Following this decision, the banks paid the additional money and received the satisfactory settlement service for which they made the payment. Reality will allow no other conclusion than that if "the defendant accepted a portion of the charges received by him," the "portion" accepted was "for settlement services actually performed." This being the case as a matter of simple economics, it is impossible for the Government to have proved (1) and (2) of its proposed elements of the offense without having conclusively disproved (4).

One may plausibly wonder why the plain language of RESPA is so ill-suited to prosecution of Gannon's acts when his activities might arguably contribute in some degree to higher-than-necessary real estate settlement costs. The answer is relatively simple. RESPA was

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[2] In economic terms, value is equivalent to price and an increment above value is necessarily gratuitous.

drafted having in mind the paradigmatic situation of, for example, the lawyer who refers business to a title company in exchange for payments to him by the company out of funds paid to the title company for the performance of actual real estate settlement services. In all the examples contained in the HUD regulations implementing Section 2607, the recipient of the illegal payments does in fact perform a "service" (the additional "something" for which the majority searches here in vain) by way of referring business to, or placing business with, a preferred title company, lawyer or other performer of settlement services.[3] The illegality under RESPA simply consists of giving or accepting payments for, e.g., referral or placement services out of funds paid for real estate settlement services, when the payee actually performs no settlement services. This is the sort of evil (payments for what in fact are referral services out of funds paid for settlement services) to which the statutory requirements of RESPA are fitted—requirements

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[3] The regulations list the following examples of violations of Section 2607:

> (1) A title company pays a portion of the title insurance premium to a person who performs no services for the title company other than placing an application with the title company.
>
> (2) A title company gives a discount or allowance for the prompt payment of a title insurance premium or other charge for a settlement service to a real estate agent, attorney or lender as a rebate for the placement of business with such title company.
>
> (3) An attorney gives a portion of his fees to another attorney, a Lender or a real estate agent who only referred a prospective client to the attorney.
>
> (4) A title company pays a "commission" to a corporation that is wholly owned by one or more Lenders, even though such corporation performs no substantial services on behalf of the title company.

24 C.F.R. § 3500.14(g) (1980).

which unfortunately do not fit the present circumstances of payment (albeit improper or illegal) for the very services which are in fact performed.

This analysis fully answers the majority's contention that Gannon "must have accepted the extra payments for something other than rendering his settlement services." (Majority Op. at 6). The majority does not suggest what this other "something" is. In fact, it cannot because there is no other "something." *But,* in the situations the statute is designed to fit, the other "something" is the referral or placement of business (or similar activity). Gannon is simply not in a position to favor anyone with his (or someone else's) business.[4]

This analysis also fully meets the majority's concern that my construction of the statute would render it "meaningless". In any situation where payments for referral or placement of business (or similar activity) are made to persons or entities which perform no settlement services out of funds paid for real estate settlement services (and these are the only sorts of situations addressed by the HUD regulations), my analysis would fully support prosecution and conviction. Section 2607 makes eminently good sense and will work well in the context of the evils it was designed to address. It will not, however, fit the present situation, where a gratuity or bribe is being paid to a public official to properly perform his assigned duty and where he is in no position to do any other favor (such as referring business) for the person paying the gratuity or bribe.

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[4] The majority also suggests that the basic dilemma to which I advert can be cured by assigning the *benefit* of Gannon's satisfactory service to the *bank employees* (and by implication) not to the bank customers. Even accepting this imaginative but highly dubious analysis as to the beneficiaries of the service, the argument does nothing to address the point that Gannon did in fact receive money "for settlement services" which he "actually performed."

In addition to the fundamental problem I have discussed, there is at least one other major difficulty in sustaining this conviction. Under the majority's approach, it is necessary to find in the first instance that the "gratuities" or "bribes" paid to Gannon were "part of a charge for real estate settlement services." Certainly, it requires a powerful massaging of the English language to convert payments which are *in addition to* a published statutory charge into "parts" or "portions" of the charge itself.[5] Even if this act of semantic contortion can be successfully performed, one simply arrives at the dead end that the services for which the charge is paid are without question the very same services which are actually performed. And the statutory requirements are thus not met.

I therefore respectfully dissent.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

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[5] The majority suggests that if its interpretation is not followed, the application of Section 2607 in "splitting" or "kickback" situations (in contrast to "gratuity" or bribe" situations) might be frustrated. (*See* Majority Op. at 9). I think again the majority ignores the virtues of plain language. A "charge" once paid to a title company, for example, is no less a "charge" because part of it is kicked back to a lawyer for referring business. Arguable failure of consideration as to part of the payment does not affect the *purpose* for which the payment was made.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 80-1108

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

THOMAS GANNON,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 79-Cr-499—BERNARD M. DECKER, *Judge.*

ARGUED JUNE 6, 1980—DECIDED NOVEMBER 3, 1980

Before SWYGERT and CUDAHY, *Circuit Judges,* and GRANT, *Senior District Judge.**

CUDAHY, *Circuit Judge.* Defendant-appellant Thomas Gannon appeals from his conviction on 28 counts of accepting a portion of a charge received for the rendering of real estate services in violation of the Real Estate Settlement Procedures Act of 1974, as amended, 12 U.S.C. § 2601 *et seq.* (1976) ("RESPA"). Defendant argues on appeal that although he did accept gratuities, these gratuities were not a "portion" of the charge defendant received for rendering the services, so acceptance of such gratuities was not prohibited by RESPA. We agree with

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* The Honorable Robert A. Grant, Senior District Judge of the Northern District of Indiana, is sitting by designation.

defendant's construction of the statute so we reverse the judgment of the district court

I.

Defendant was charged in a twenty-nine count indictment with having accepted "payments for Torrens filings which were in excess of those authorized by law" from various institutions which made federally-related mortgage loans in violation of the criminal provisions of RESPA, 12 U.S.C. § 2607(b) (1976). Each extra payment was the basis of a separate count of the indictment. The fact that defendant accepted these excess payments from institutions which made federally-related loans is not in dispute.

Defendant was employed as a counterman in the Torrens office of the Cook County Recorder of Deeds. The function of a counterman was to accept documents incident to the transfer of real estate for registration under the Torrens system so that the Torrens office could issue certificates of title for property. Charges for the registration of documents and other services were set by statute. The counterman would accept the statutory fees from the customer, give them to the cashier (who would stamp the receipt "paid") and give the stamped receipt to the customer. It was part of a counterman's job to provide prompt and courteous service to all customers.

Employees of various banks and savings and loan associations testified that when they submitted documents to defendant for Torrens registration they gave defendant two or three dollars in cash in addition to the statutory fees. The statutory fees were frequently paid by cashier's check because the charge for a particular filing could be ascertained in advance from the published list of fees, but the excess payments were always in cash. Each employee of the institution involved stated that another employee at the institution had told him to make the extra payment; defendant did not request the extra pay-

ment. The employees generally believed that they received prompt service in return for the gratuities.[1]

In the fall of 1977, signs were posted in the Torrens office which stated:

ATTENTION
OFFICE REGULATIONS
PROHIBIT MEMBERS OF
THE STAFF FROM ACCEPTING
GRATUITIES FROM ANY SOURCE
IN THE CONDUCT OF OFFICE BUSINESS

Defendant also signed a pledge during this period which stated that he understood that "the acceptance of gratuities from any source in the conduct of office business is strictly forbidden. Violators of this regulation will be subject to disciplinary action."

Cheryl Olk, an employee of the Harris Trust and Savings Bank, testified that on October 28, 1977, when she told defendant that the extra payments would have to stop, defendant said "Fine. No problem." Subsequent filings Olk submitted to defendant were handled "normally," but Olk stated that in March 1978 defendant told her that she worked for a "cheap bank" and if something were not done their work would not get done.

The court found defendant guilty, after a bench trial, on twenty-eight counts[2] of violating RESPA by accepting these extra payments. Defendant was sentenced to four months imprisonment and fined $1000.00.

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[1] The practice of giving Torrens office countermen a gratuity in return for faster service was apparently widespread because the Government has recently prosecuted several other countermen for violating § 2607(b) by accepting such excess payments. The Government stated at oral argument that these are the first prosecutions brought under the criminal provisions of RESPA.

[2] Count 17 was dismissed on the Government's motion.

II.

The indictment charged that defendant's activities violated the criminal provisions of RESPA, particularly 12 U.S.C. § 2607(b) (1976). Section 2607 provides, in pertinent part:

> Prohibtion against kickbacks and unearned fees
>
> (a) Business referrals
>
> No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.
>
> (b) Splitting charges
>
> No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed
>
> (c) Fees, salaries, compensation, or other payments
>
> Nothing in this section shall be construed as prohibiting (1) the payment of a fee [for goods or services actually rendered].
>
> (d) Penalties for violations; joint and several liability: treble damages; court costs; attorney fees
>
> (1) Any person or persons who violate the provisions of this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

Defendant does not dispute the government's claim that he accepted payments in excess of the statutory fees for Torrens filings. However, defendant argues on appeal

that he did not violate Section 2607(b) by "accept[ing] a portion of charges received by him for the rendering of real estate settlement services," as charged in the indictment, because the excess payments were gratuities which were not a *portion* of what he received *for rendering the service.*

The district court rejected this argument when defendant raised it in his motion to dismiss the indictment and his motion for a judgment of acquittal at the close of the Government's case. The court specifically stated that the gratuities "were a regular portion of payments for the rendering of settlement services." Thus the issue presented by this appeal is whether the excess payments defendant accepted can properly be characterized as a "portion" of a charge "received for the rendering of a real estate settlement service" within the meaning of Section 2607(b).

We disagree with the district court's interpretation of Section 2607(b) because, in general, a criminal statute must be strictly construed. *United States* v. *Campos-Serrano,* 404 U.S. 293, 297 (1971); *United States* v. *Dudley,* 581 F.2d 1193, 1197 (5th Cir. 1978). The language of Section 2607(b) clearly states that accepting a portion of a charge received for a particular service (*i.e.,* for rendering a real estate service) is prohibited. However, in the instant case, the indictment states that the payments defendant received were "other than for the services he actually performed" and the Government agrees with this characterization. As the Government stated in its Trial Memorandum,

> the parties paying the extra fees got from the defendant those settlement services to which they were already entitled by virtue of having paid the prescribed statutory Torrens charges. There were no "services actually performed" in return for the payments, as that phrase has been defined by Congress,

HUD and the Courts. Government's Trial Memorandum dated November 29, 1979, pp. 8-9.[3]

Thus, the excess payments defendant accepted cannot properly be characterized as a *portion* of the charges he received *for the rendering of real estate services* because the Government claims that no service was performed in return for these excess payments. In fact, the only charges defendant received for real estate settlement services were the statutory fees, but defendant did not accept any portion of those fees. Rather, he accepted gratuities which were unrelated to any service he provided, together with the statutory fees for the services rendered. Defendant then gave the statutory fees to the cashier and had the appropriate receipt marked "paid." The fact that defendant physically "received" (for his own account) a gratuity for which he performed no services and at the same time received (for the Torrens office account) a charge made for the rendering of real estate settlement services does not mean that the gratuity was a portion of the charge made for real estate settlement services.

The Government also argued at trial that in addition to scienter, it must prove the following elements to establish that defendant violated Section 2607:

(1) that the defendant accepted a portion of the charges received by him,

(2) that the charges were for the rendering of a real estate settlement service,

(3) that the settlement service involved a federally related mortgage loan and

---

[3] As the district court noted, if defendant *had* performed a service in return for these payments the statute would not have been violated because § 2607(c)(2) states that "the payment to any person of a bona fide salary or compensation or other payment . . . for services actually performed" is not prohibited.

(4) that the portion was other than for settlement services actually performed.

Government's Trial Memorandum of November 29, 1979, pp. 9-10 and Appellee's Brief, p. 21.

The Government's analysis of the elements to be proved clearly shows the inconsistency inherent in its position. On the one hand, the Government recognizes in the first two elements that it must prove that the money defendant kept for himself ("accepted") was part of funds he received for rendering a specific service (a real estate settlement service). But in the fourth element the Government indicates that it must somehow prove that the money ("portion") defendant kept for himself was "other than for settlement services actually performed." Thus the Government's position is logically inconsistent because the money defendant accepted must, in reality, be either part of the charges he received for settlement services rendered or be "other than" the charges for settlement services rendered. Since these two concepts are mutually exclusive, the money cannot be both part of and "other than" such charges.

We therefore conclude, as a matter of statutory construction, that defendant did not violate Section 2607(b) by accepting these additional payments because they cannot properly be considered a portion of the charge made for real estate settlement services. The fact that defendant's conduct may have violated some other statute or the internal rules of the Torrens office does not affect our analysis of whether the money defendant accepted was a portion of a charge for rendering real estate settlement services within the meaning of Section 2607 (b).[4] The sort of tortured, if not tortuous, construction of a criminal statute needed to support this conviction is, under settled principles, simply not acceptable.

It should also be noted that nothing in the legislative history of RESPA indicates that Section 2607(b) was

[4] It goes without saying that nothing in this opinion is intended to suggest approval of defendant's conduct.

intended to prohibit local government employees from accepting gratuities. Rather the section was directed at curbing abusive practices which arose from "competitive forces in the conveyancing in dustry." Section 2607 was

> intended to prohibit all kickback or referral fee arrangements whereby any payment is made or "thing of value" furnished for the referral of real estate settlement business. The section also prohibits a person or company *that renders a settlement service from giving or rebating any portion of the charge to any other person* except in return for services actually performed.
>
> • • •
>
> In a number of areas of the country, competitive forces in the conveyancing industry have led to the payment of referral fees, kickbacks, rebates and unearned commissions as inducements to those persons who are in a position to refer settlement business. Such payments may take various forms. For example, a title insurance company may give 10% or more of the title insurance premium to an attorney who may perform no services for the title insurance company other than placing a telephone call to the company or filling out a simple application. A discount or allowance for the prompt payment of a title insurance premium or other charge for a settlement service may be given to realtors or lenders as a rebate for the placement of the business with the individual or company giving the discount. An attorney may give a portion of his fee to another attorney, lender or realtor who simply refers a prospective client to him. In some instances, a "commission" may be paid by a title insurance company to a corporation that is wholly-owned by one or more savings and loan associations, even though that corporation performs no substantial services on behalf of the title insurance company. 1974 U.S. Code Cong. and Ad. News 6551 (emphasis supplied).

This passage indicates that Section 2607(b) was intended to prevent a person who renders the settlement service from giving a portion of the charge to another person who did not render the service. Thus, subsection (b) was entitled "Splitting Charges" and prohibits the acceptance of a "portion, split or percentage." Given this interpretation of Section 2607(b), it is difficult to argue that the activities of the defendant in the instant case were prohibited because defendant did not give a portion of the charge for the settlement service to someone else or receive such a portion from someone who rendered the service.

RESPA also authorizes the Secretary of the Department of Housing and Urban Development ("HUD") to make rules, regulations and interpretations necessary to achieve the purposes of the Act. 12 U.S.C. § 2617 (1976). These regulations include the following examples of violations of Section 2607:

> (1) A title company pays a portion of the title insurance premium to a person who performs no services for the title company other than placing an application with the title company.
>
> (2) A title company gives a discount or allowance for the prompt payment of a title insurance premium or other charge for a settlement service to a real estate agent, attorney or lender as a rebate for the placement of business with such title company.
>
> (3) An attorney gives a portion of his fees to another attorney, a Lender or a real estate agent who only referred a prospective client to the attorney.
>
> (4) A title company pays a "commission" to a corporation that is wholly owned by one or more Lenders, even though such corporation performs no substantial services on behalf of the title company. 24 CFR § 3500.14(g) (1979).

There is nothing in these regulations to indicate that defendant's activities in the instant case are prohibited by Section 2607(b).

In light of the language of Section 2607(b), its legislative history and the regulations promulgated by HUD, we must conclude that defendant's activities were not prohibited by Section 2607(b).[5] The judgment of conviction entered by the district court is therefore reversed.

REVERSED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

---

[5] This disposition makes it unnecessary for us to consider the other grounds for reversal defendant raised on appeal.

In The

UNITED STATES DISTRICT COURT

For The Northern District Of Illinois

Eastern Division

UNITED STATES OF AMERICA

vs.

THOMAS GANNON

No. 79 CR 499

MEMORANDUM OPINION AND ORDER

Defendant Thomas Gannon, employed by the Torrens Office of the Cook County Recorder of Deeds, has been tried for accepting a portion of charges for the rendering of real estate settlement services, in violation of 12 U.S.C. §2607(b). In response to the government's post-trial memorandum, defendant argues that the evidence presented was insufficient to sustain a conviction, and that his conduct was not reachable under the statute in question.

It is not disputed that Gannon accepted payments of $2 to $4 in connection with services on certain mortgage loans. These payments, defendant contends, were not a portion of the fees paid to the Torrens Office, but were instead unsolicited gratuities in excess of those fees. However, testimony at trial revealed that "gratuities" were a regular portion of payments for the rendering of settlement services. Agents of the banks were given the impression that gratuities had to be paid in order to get the work done. These "gratuities" need not have been overtly represented to be part of the charges for the performance of services to constitute payments in violation of the statute. In fact, if these charges had been represented as charges for services actually performed, there might not have been a violation of the statute at all, under the exception listed at 12 U.S.C. §2607(c)(1)(B).

Defendant also relies on the interpretation given the statute by Judge Aspen in *United States* v. *Pawelek*, 79 CI. 498 (N.D.Ill. Nov. 30, 1979). Judge Aspen implied a knowledge element in the statute, holding that the defendant must be shown to have known that the bank procuring services would charge its clients the portion of the fee paid to the counterman. This knowledge requirement would be satisfied if the transaction took the form where one payment was made to the counterman, who kept a portion of it; but not satisfied where two payments were made, one for the filing and the other to the counterman personally.

Even in a one-payment transaction, however, it is impossible for the counterman to know for certain whether all of the payment including the "gratuity" is directly charged to the customer. The bank may still elect to absorb as overhead the portion of the charge paid to the counterman. To impute knowledge in the one-payment situation but not in the two-payment situation would be to render the statute virtually ineffectual in eradicating the practice of accepting gratuities. It is difficult to believe that Congress intended merely to require that charges other than for services actually performed be paid separately from the legitimate charge. It is more plausible to assume that Congress meant to outlaw both practices. The court concludes that defendant in this case had the requisite state of mind to violate this statute.

Addressing the question whether the statute was directed at the conduct defendant was engaged in, defendant argues that the purpose of the statute was to prohibit parties rendering real estate services from rebating portions of charges to financial institutions for referral fees and the like. The statute cannot be read so narrowly. It prohibits any person from accepting a portion of charges for real estate settlement services. The Congressional purpose in such a broad enactment was clearly stated to be to "ensure that the costs to

the American home buying public will not be unreasonably or unnecessarily inflated by abusive practices." Senate Report No. 93-866, 1974 U.S. Code Cong. & Ad. News p. 6548. The "gratuities" paid to Torrens countermen, directly or indirectly, are passed on to the consumer, and inflate the costs of home buying. As such, they are included in both the statutory language and the statutory purpose.

The court finds the defendant guilty on all counts except Count 17, which was dismissed by the Government.

Enter: /s/ Bernard M. Decker
United States District Judge

Dated: December 17, 1979.

In The

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STANLEY PAWELEK,

Defendant.

No. 79 CR 498

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Hon. Marvin E. Aspen, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Friday November 30, 1979, in the afternoon session.

The Clerk: 79 CR 498, United States v. Pawelek.

The Court: Good morning, gentlemen.

Mr. Newman: Good morning, your Honor. John Newman and William Coulson for the United States.

The Court: I have had the opportunity not only to review the legal authorities cited in the Government's memorandum, but also those cited in Mr. Barsy's argument. I also have reviewed both my notes and transcripts of the testimony in this case, as well as the extensive exhibits that have been filed in the case.

This is a case of first impression; at least, the Government indicates that this is the first trial under Section 8(b) of RESPA and because it is, I have looked at the statute fairly carefully and looked at the facts in this case to see whether they fall within the ambit of that statute.

The Government indicates that the elements of proof required for a Section 8(b) violation are these:

> First, that the defendant accepted a portion of the charges received by him.
>
> Second, that the charges were for the rendering of a real estate settlement service.
>
> Third, that the settlement service involved a federally related mortgage loan.
>
> Fourth, that the portion was for other than settlement service actually performed.

The Government initially set out these four elements.

Mr. Barsy argued, and I agree with him, that there must be a mental state as part of the offense, even though the statute itself may be silent as to any intent, knowledge or other mental state.

The Government in its brief suggested that the defendant simply need to have been shown to know that he accepted money to which he was not entitled and that—tantamount to the appropriate Illinois Statute, Chapter 38, Section 33-3, Official Misconduct, I believe—the fact that he took the money is enough in that he knew that he took the money; but that it was not necessary to prove that he knew that the money, in fact, was a sum that was to be added to the fee charged the client by the savings and loan or other financial institution.

I disagree with that position. I think that a fifth element of this offense is knowledge. However, I believe that knowledge can be imputed from the facts in the case and from certain actions by the defendant.

I have reviewed the files and I have examined each of the 36 counts with a view not only as to the elements of proof that I have indicated that I believe are part of the offense, but in particular to rule out certain factual situations which I felt did not bring the conduct within the statute.

First, there was one count of the indictment, Count Nine, where the defendant, although initially accepting the money, returned the money. In several of the counts, there is an indication that the defendant did, in fact, provide a special service for the savings and loan association and eventually for the customer, perhaps only a messenger service, but something above and beyond the duties normally performed.

Third, there were a series of counts where there was no proof that the defendant actually received the money that the indictment alleged that he did receive. There simply was a statement from a bank or savings and loan official to the effect that Mr. Pawelek customarily took the money and that he prepared a draft or either a check for the recorder of deeds, of which Mr. Pawelek would get a part or a separate petty cash disbursement or a separate check to cover payment to him and gave it to somebody else, who allegedly transferred the money to Mr. Pawelek. In several instances, that somebody else did not testify and that important element of proof was missing.

Finally, I was concerned with the statutory requirement that the moneys received be a portion of the fee the customer is paying for the service. The Government in its brief says the "portion," in the context of this case means (1) that it was a portion of the money which the customer's agent, the savings and loan, paid out on that date for the filing; and (2) it was a portion of the settlement charges imposed on the customers.

I agree that under the statute, the Government's proof is just that: that the Government must prove that the moneys received were a portion in the context of both of those elements.

There were essentially two types of transactions: In the one transaction, the savings and loan official presented a check payable to the recorder of deeds for an amount

over the statutory charges assessed by the recorder of the deeds. For example, if the filing fee service was $46, there was a check made out for $50, which was given to Mr. Pawelek. A receipt for $46 was given back to the savings and loan official, $4 was kept by Mr. Pawelek, and the customer was billed for $50. The check was made out for $50. The other cases more or less fell into a category whereby, using the same example that I did before, for a $46 payment, a check for $46 was made out to the recorder of deeds or cash for that amount was given to the recorder of deeds. In addition, a small amount of cash—I give as an example, $4—was paid separately to Mr. Pawelek. This money either came from the petty cash fund of the savings and loan association or a separate check was made payable to a savings and loan official, who cashed it and used the money to pay Mr. Pawelek.

There is a distinction in these two situations, although clearly if this case were brought under the appropriate state statute, the distinction would be meaningless. As I read the Illinois statute, if a public official under these circumstances takes money for a service, for which he is not entitled to receive money, that person violates state law no matter how the payment is effectuated to that person. In that sense, in a state proceeding it would not matter how the money was disbursed. However, under the RESPA Act, as I indicated before, it must be proved that it was a portion of the fee imposed upon the customer; and that the defendant had knowledge that he was accepting a portion of that fee.

I think it is clear that when a check is made out by the savings and loan association for an amount over and above the fee charged, where that check is made payable to the recorder of deeds and where the defendant accepts the overage from that check made out to the recorder of deeds, (1) he has accepted a portion of the settlement charges, an unearned portion; and (2) that his action in doing so clearly imputes

knowledge that he was accepting money of that character. For that reason, and in examining the counts of the indictment, I find that the government has proved the defendant guilty beyond a reasonable doubt in Counts 12, 33, 34 and 35 of the indictment. There will be a finding of guilty as to those counts. As to the remaining counts in the indictment, there will be a finding of not guilty.

Judgment will be entered on the finding.

24 C.F.R. §3500.14(g) (1980), page 265.

(g) *Examples of violations under section 8.* The following are examples of violations under section 8 and are applicable by analogy to other providers of settlement services in addition to those specified in the examples:

(1) A title company pays a portion of the title insurance premium to a person who performs no services for the title company other than placing an application with the title company.

(2) A title company gives a discount or allowance for the prompt payment of a title insurance premium or other charge for a settlement service to a real estate agent, attorney or lender as a rebate for the placement of business with such title company.

(3) An attorney gives a portion of his fees to another attorney, a Lender or a real estate agent who only referred a prospective client to the attorney.

(4) A title company pays a "commission" to a corporation that is wholly owned by one or more Lenders, even though such corporation performs no substantial services on behalf of the title company.

24 C.F.R. Appendix B (1980), pages 270-271.

Appendix B—Facts and Comments on Section 8 Which Provide Further Clarification of Regulations

The following illustrations provide additional guidance on the meaning and coverage of Section 8 of RESPA. While particular illustrations may refer to providers of settlement services, such illustrations are applicable by analogy to providers of settlement services other than those specifically mentioned. It should be noted that other provisions of Federal or state law may be applicable to the practices and payments discussed in the following illustrations.

1. *Facts.* A, a provider of settlement services, maintain and abnormally large balance in a non-interest bearing account with B, a mortgage lender, pursuant to an understanding that B will refer borrowers of Federally Related Mortgage Loans to A for the purchase of settlement services in connection with the settlement of such loans.

Comments. Allowing B to use the deposited funds at no interest appears to be a thing of value given by A to B pursuant to an agreement or understanding that business incident to a real estate settlement shall be referred to A in violation of Section 8 of RESPA. The maintenance of any accounts reasonably needed by A in the normal course of its business would not be a violation of Section 8.

2. *Facts.* B, a lender of Federally Related Mortgage Loans, pays A, a real estate agent, a fee of $25 per transaction purportedly for services performed such as arranging for B's appraiser to visit the property. The purported services for which the fee is paid are services that real estate agents frequently perform as part of their services and the fee is really intended to enable B to compensate A for referring potential borrowers to B.

Comments. Both A and B are in violation of Section 8 of RESPA, since the fee is being paid in compensation 8 of RESPA, since the fee is being paid in compensation for the referral of business rather than for legitimate services actually rendered by B on behalf of A.

3. *Facts.* A, a provider of settlement services, provides settlement services at abnormally low rates or at no charge at all to B, a builder, in connection with a subdivision being developed by B. B agrees to refer purchasers of the completed homes in the subdivision to A for the purchase of settlement services in connection with the sale of individual lots by B.

Comments. The rendering of services by A to B at little or no charge constitutes a thing of value given by A to B in return for the referral of settlement business and both A and B are in violation of Section 8 of RESPA.

4. *Facts.* B, a Lender, encourages persons who rereceive Federally Related Mortgage Loans from it to employ A, an attorney, to search title and perform related settlement services in connection with their transaction. B and A have an understanding that in return for the referral of this business A will provide legal services to B or B's officers or employees at abnormally low rates or for no charge.

Comments. Both A and B are in violation of Section 8 of RESPA.

5. *Facts.* A, A provider of settlement services, pays referral fees to persons who refer settlement business on commercial real estate to A.

Comments. While commercial transactions are not covered by RESPA, the payment of such referral fees would be a violation of Section 8 if they involve indirect compensation for the referral of settlement business covered by RESPA.

6. *Facts.* A, a real estate broker, obtains all necessary licenses under state law to act as a title insurance agent. A refers individuals who are purchasing homes in transactions in which A participates as a broker to B, a title company, for the purchase of title insurance services. A fills out a simple form but performs no other services in connection with the issuance of the title insurance policy. B pays A a commission for the transactions.

Comments. The payment of a commission by B to A under circumstances where no substantial services are being provided by A to B is a violation of Section 8 of RESPA.

7. *Facts.* A, a "mortgage originator" or "mortgage broker", receives loan applications and refers borrowers to lenders for a fee.

Comments. If A performs services such as obtaining credit and appraisal information or preparing an application for mortgage insurance or guarantee which are of value to the Lender paying the fee, without reference to the referral value of such services, and the fees paid bear a reasonable relationship to the value of such services, the payment of such a fee would not be in violation of Section 8 of RESPA.

8. *Facts.* A, a title insurance company, provides among its other services an "insured Closing Service Letter". Under this letter, for which no separate or additional charge is made, the company agrees to provide indemnity against loss due to certain fraudulent or negligent acts of the company's policy-issuing agents or approved attorneys in complying with closing instructions and in conducting the closing of any transaction in connection with which a policy of title insurances is to be issued by A.

Comments. Where A has provided such an Insured Closing Service Letter to a specified person and the protection afforded thereby is effective without regard to whether the particular case was referred to A by the

person receiving protection under such letter, the provision of the letter would not be pursuant to an agreement or understanding that settlement services be referred, and therefore not in violation of Section 8.

9. *Facts.* A, a service corporation, is a title insurance agent for B, a title insurance company. The search and examination of title, in connection with applications for title insurance policies prepared by A, are performed by employees of B, Employees of B also make any determinations as to the insurability of title. A issues title insurance policies on behalf of B and receives a commission equal to the amount paid other title insurance agents in the community, including other agents of B, who perform the title search and examination as well as prepare and issue the title insurance policy.

Cohmments. While A may be performing some real service for B, the fact that the amount of the commission received by A is equal to the commissions customarily paid to full-service title insurance agents who perform substantially greater and more valuable services indicates that the commission paid by B to A is really intended to compensate A for the referral of business. The amount by which the commission exceeds the reasonable value of the services rendered by A to B would be a referral fee prohibited by Section 8 of RESPA. Section 8 does not prohibit variations in the amount of commissions that may be paid, nor does it require that the quantum of services rendered be identical in all cases, so long as services significant to the issuance of a title insurance policy are rendered and the amount of the commission bears a reasonable relationship to the services rendered.

10. *Facts.* A, a real estate broker, refers title business to B, a company that is a licensed title agent for C, a title insurance company. A is part owner of B, B performs the title search and examination, makes determinations of insurability and issues a policy of title insurance on behalf of C, for which C pays B a com-

mission. B pays annual dividends to its owners, including A, based on the relative amount of business each of its owners refers to B.

Comments. While the payments of a commission by C to B is not a violation of Section 8 of RESPA, if the amount of the commission constitutes reasonable compensation for the services performed by B for C, the payment of a dividend or the giving of any other thing of value by B to A that is based on the amount of business referred to B by A constitutes a violation of Section 8. Similarly, if the amount of stock held by A in B (or, if B were a partnership, the distribution of partnership profits by B to A) varied in proportion to the amount of business referred or expected to be referred, or if B retained any funds for subsequent distribution to A where such funds were generally in proportion to the amount of business A referred to B, such arrangements would constitute violations of section 8.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA

vs.

THOMAS GANNON

No. 79 CR 499

Violation: Title 12, United States Code, Section 2607(b)

The SPECIAL MARCH 1978 GRAND JURY charges:

1. At all material times,

(a) The Torrens office of the Cook County Recorder of Deeds was an agency of Cook County, Illinois, which provided certain real estate settlement services to the public, including the provision of title certificates to real estate in Cook County;

(b) Thomas Gannon, defendant herein, was employed by the Torrens office as a counterman whose duties included the provision of real estate title certificates;

(c) Crawford Federal Savings and Loan ("Crawford"), Chicago Federal Savings and Loan ("Chicago"), Northwest Federal Savings and Loan ("Northwest"), Harris Trust and Savings Bank ("Harris"), St. Paul Federal Savings and Loan ("St. Paul"), and South Holland Trust and Savings Bank ("South Holland"), were in the business of making federally-related mortgage loans. The deposits of these institutions were insured by the Federal Savings and Loan Insurance Corporation ("FSLIC"), of the Federal Deposit Insurance Corporation ("FDIC"), agencies of the Federal Government.

(d) Thomas Gannon, defendant herein, engaged in the pattern and practice of accepting from the institutions named above, payments for Torrens filings which were in excess of those authorized by law, such excess payment constituting a portion of the charges received by him for the rendering of real estate settlement services.

2. On or about each of the following dates, at Chicago, in the Northern District of Illinois, Eastern Division,

THOMAS GANNON,

defendant herein, did unlawfully accept a portion of charges received by him for the rendering of real estate settlement services in connection with a federally-related mortgage loan made by the institutions listed below, which portion was other than for the services he actually performed; each such acceptance listed below constituing a separate count of this indictment.

Opposition

Office - Supreme Court, U.S.
FILED
SEP 23 1981
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No. 81-192

In the Supreme Court of the United States

OCTOBER TERM, 1980

THOMAS GANNON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the acceptance of gratuities by a county government employee performing real estate settlement services is prohibited by 12 U.S.C. 2607(b).

2. Whether the gratuities accepted by petitioner were a portion of a charge made or received for the rendering of a real estate settlement service within the meaning of 12 U.S.C. 2607(b).

3. Whether proof of knowledge that the recepient of a federally insured mortgage loan ultimately would bear the expense of the gratuities received by petitioner was an essential element for a conviction under 12 U.S.C. 2607(b).

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 81-192

THOMAS GANNON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-17a), the original panel opinion (Pet. App. 18a-27a), and the opinion of the district court (Pet. App. 28a-30a) have not been reported.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1981. The petition for a writ of certiorari was filed on July 31, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Following a bench trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on 28 counts charging violations of the criminal provisions of the Real Estate Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. 2607(b). He was sentenced to

four months' imprisonment and was fined $1,000. A panel of the court of appeals reversed petitioner's conviction, but upon rehearing en banc, the court of appeals affirmed.

The undisputed evidence at trial is summarized in the opinion of the court of appeals (Pet. App. 2a-3a). Petitioner worked for the Torrens Section of the Office of the Recorder of Deeds for Cook County, Illinois. The mission of the Torrens Section is to guarantee the title to real property in the County by issuing title certificates for the property. The fees for the issuance of the certificates are established by state statute.

Petitioner dealt with the public as a "counterman," performing various ministerial tasks in connection with the issuance of real estate title certificates. Countermen receive a salary, in return for which they are to provide the public with prompt and courteous service (Pet. App. 2a). A sign posted in the office where petitioner was employed stated that all members of the staff were prohibited from accepting gratuities,[1] and petitioner signed a pledge in the fall of 1977 acknowledging that the acceptance of gratuities was prohibited.[2]

Nevertheless, the evidence showed that during 1977, 1978, and 1979, petitioner routinely accepted gratuities ranging between $2 and $4. Each count of the indictment related to the acceptance of a specific gratuity. For example, representatives of six banking institutions testified, in

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[1]The sign read: "ATTENTION: OFFICE REGULATIONS PROHIBIT MEMBERS OF THE STAFF FROM ACCEPTING GRATUITIES FROM ANY SOURCE IN THE CONDUCT OF OFFICIAL BUSINESS" (Pet. App. 2a).

[2]The pledge signed by petitioner reads as follows: "The undersigned hereby acknowledges and understands that the acceptance of gratuities from any source in the conduct of office business is strictly forbidden. Violators of this regulation will be subject to disciplinary action" (Pet. App. 2a).

person or by stipulation, that they regularly and personally paid petitioner gratuities in connection with mortgage loan filings in order to ensure his prompt service (Tr. 40, 50-56, 74, 84-85, 92-93, 103, 113-117). In one instance, a representative of a bank that had stopped paying gratuities to petitioner was told by petitioner that she worked for a "cheap bank" and that "if something wasn't done" the bank's work would not get done (Pet. App. 3a). The bank representatives paid the gratuity either separately or as part of a lump sum payment that included the statutory fee (Pet. App. 19a; Tr. 113-117). All of the financial institutions whose representatives paid gratuities to petitioner were federally insured by either the Federal Savings and Loan Insurance Corporation or by the Federal Deposit Insurance Corporation (Tr. 113-117).

Petitioner did not deny that he accepted the gratuities. Instead, his defense was that his conduct did not fall within the scope of the criminal provisions of RESPA, 12 U.S.C. 2607(b). The district court rejected this contention. Pet. App. 28a-30a. Although a panel of the court of appeals initially reversed petitioner's conviction on this ground (Pet. App. 18a-27a), the full court reheard the case en banc and affirmed the convictions. Pet. App. 1a-12a. Judges Cudahy and Swygert dissented. *Id.* at 12a-17a.

ARGUMENT

The decision of the en banc court of appeals reflects a reasonable interpretation of 12 U.S.C. 2607(b) that is fully consistent with the congressional purpose of preventing the payment of kickbacks and unearned fees and reducing real estate settlement charges. Moreover, as petitioner concedes (Pet. 10), this is a case of first impression. The instant case and three other cases involving the acceptance of gratuities by employees of the Cook County Recorder of Deeds (see Pet. App. 9a n.3) were the first prosecutions brought under RESPA (Pet. App. 20a n.1). As a result, no other court of

appeals has had occasion to construe 12 U.S.C. 2607(b), and there is perforce no conflict among the circuits on the question of statutory interpretation presented. Review by this Court therefore is unwarranted.

1. Petitioner contends (Pet. 10-17) that his acceptance of gratuities from representatives of financial institutions that obtained title certificates from the Torrens Office is not prohibited by 12 U.S.C. 2607(b). That section provides:

> No person shall give and no person shall accept any ortion, split, or percentage of any charge made or eceived for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

The plain language of the Section covers petitioner's conduct. The issuance of a title certificate by the Recorder of Deeds surely is a "real estate settlement service" for purposes of 12 U.S.C. 2607(b),[3] and petitioner does not contend otherwise. See Pet. 14.[4] Moreover, because the *total* amount paid by the financial institutions for the rendering of the settlement services consisted of the statutory fee *plus* the gratuity, it is clear that petitioner's receipt of the gratuity constituted the acceptance of a "portion" of the total charge received for the settlement services. And, finally, because petitioner received a salary from the County in full compensation for the real estate settlement services he performed, his receipt of a gratuity over and above that salary—a gratuity that, as petitioner concedes (Pet. 4-5, 16), was prohibited by office policy and a state

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[3]The term "settlement services" is defined in 12 U.S.C. 2602(3) expressly to include "the provision of title certificates."

[4]Similarly, because the financial institutions involved in this case were federally insured, the incidents giving rise to petitioner's convictions all pertained to transactions "involving a federally related mortgage." See 12 U.S.C. 2602(1)(B).

anticorruption statute—reasonably may be regarded as having been "other than for services actually performed" within the contemplation of 12 U.S.C. 2607(b).

This interpretation is supported by Subsection (c) of 12 U.S.C. 2607, which provides that nothing in that Section shall be construed as prohibiting "the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed." 12 U.S.C. 2607(c)(2). The receipt of a gratuity prohibited by office policy and state law cannot be deemed "bona fide" remuneration within the meaning of this exception to criminal liability.

In addition, the construction given Section 2607(b) by the court below is consistent with the congressional findings and statement of purpose, expressed in RESPA itself, that "significant reforms in the real estate settlement process are needed to insure that consumers * * * are protected from unnecessarily high settlement charges caused by certain abusive practices that have developed in some areas of the country" (12 U.S.C. 2601(a))[5] and that RESPA is intended

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[5]Petitioner contends (Pet. 11-12) that his receipt of what he characterizes as "small gratuities," ranging between $2 and $4, cannot be thought to result in "unnecessarily high settlement charges" within the meaning of the congressional findings and statement of purposes. But it cannot seriously be disputed that the receipt of these payments rendered the charge for the issuance of a title certificate higher than it otherwise would have been. And particularly because these payments were prohibited by office policy and state law, the inflation of the statutorily established fee they caused surely was "unnecessary."

In any event, 12 U.S.C. 2607(b) prohibits the acceptance of *any* portion of *any* charge (other than as earned for the performance of settlement services), irrespective of the amount involved. At the very least, the payments involved in this case—which followed a consistent pattern—"*tend* to increase unnecessarily" (12 U.S.C. 2601(b)(2); emphasis added) the charge for the particular settlement charge. Moreover, petitioner has not suggested at what point *above* $4 the amount received should be thought to come within the statute's reach,

to result in the elimination of kickbacks that "tend to increase unnecessarily" the cost of settlement services and in "significant reform and modernization of local recordkeeping of land title information" (12 U.S.C. 2601(b)(2) and (4)).

Petitioner nonetheless argues (Pet. 12-15) that his conduct is not within the reach of the statute because the examples of prohibited conduct set forth in a passage from the Senate Report on RESPA (S. Rep. No. 93-866, 93d Cong., 2d Sess. 6-7 (1974)) and in regulations issued by the Secretary of Housing and Urban Development (24 C.F.R. 3500.14(g) & App. B) do not describe the precise fact situation involved in this case.[6] But nothing in the passage from the Senate Report or the Secretary's regulations suggests that the examples listed were intended to be exclusive or that conduct such as that involved in this case is excepted from coverage. Accordingly, the legislative history and regulations do not provide a basis for concluding that conduct that is prohibited by a reasonable construction of the statutory language, and the prohibition of which is fully consistent with the congressional purpose in enacting RESPA, is nevertheless excluded from coverage.[7]

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or how a principled line might be drawn. But even where any one payment, standing alone, may be thought to be relatively small in amount, Congress reasonably could have concluded that a cumulation of such unearned payments would unreasonably burden the settlement process.

[6]Petitioner acknowledges that the passage in the Senate Report indicates that Section 2607(b) would bar the Torrens Office from giving a portion of the charges it receives to the party utilizing its services (in this case, the financial institution), but argues (Pet. 14) that the statute does not bar the receipt of a portion of the same charges by an employee of the Torrens Office, the entity performing the settlement service. This contention is inconsistent with the unqualified language of Section 2607(b), which provides that *no person* shall accept an unearned portion of the charge.

[7]Petitioner's reliance (Pet. 15-16) on *United States* v. *McNeive*, 536 F. 2d 1245 (8th Cir. 1976) is misplaced. *McNeive* involved an interpretation of the mail fraud statute, 18 U.S.C. 1341, not RESPA. The court

2. Petitioner contends (Pet. 17-19) that he did not receive a portion of the charge for the real estate service performed by the Torrens Office. That charge, petitioner argues, is the statutorily established fee, which was paid to and retained in full by the County. Thus, the argument concludes, the gratuity was not a "portion" of the fee for the settlement service.

The district court found, however, that

> "gratuities" [accepted by petitioner] were a regular portion of payments for the rendering of settlement services. Agents of the banks were given the impression that gratuities had to be paid in order to get the work done.

Pet. App. 28a. Petitioner has not demonstrated any basis for disturbing this factual finding, which was sustained by the court of appeals. Pet. App. 4a-6a.[8] Accordingly, the

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in that case reversed the conviction of a local plumbing inspector who received in the mail unsolicited gratuities from a contractor each time the contractor submitted an application. The court found that the inspector had faithfully performed his duties and therefore had not engaged in a scheme or artifice to defraud the city or the public of loyal and honest service. 536 F. 2d at 1251-1252. The issue in the instant case, however, is not whether petitioner committed a fraud against the County or its residents. Fraud is not an element of the offense described in 12 U.S.C. 2607(b). It is sufficient that petitioner accepted an unearned portion of the charge received for the issuance of a title certificate. The acceptance of unearned fees inflates settlement charges—the evil Congress sought to prevent—whether or not the conduct involved is fraudulent.

[8]Petitioner cites (Pet. 19) a stipulation that he had never asked representatives of the banks to make extra payments. But such a request or demand can arise implicitly from a course of dealing, even if not made explicitly. As the court of appeals held (Pet. App. 5a-6a), the evidence in this case supports the district court's finding of such an implicit demand. Moreover, as the court below observed (*ibid.*), one witness testified to petitioner's statement "that if something wasn't done [about the particular bank's cessation of payments] our work wouldn't get done" (Tr. 55).

gratuities were part of the charge "made" by the Torrens Office, through petitioner, for the performance of his services. But even if the course of conduct engaged in by petitioner and his colleagues in the Torrens Office did not establish the gratuities as part of the charge *made* by the office for the settlement services, the gratuities were, in any event, a portion of the total charge *received* by the Torrens Office and its employees for those services. Section 2607(b) prohibits the acceptance of an unearned portion of any charge "made *or* received" for the rendering of settlement services.

3. Finally, petitioner contends (Pet. 20-21) that his conviction must be set aside because the prosecution did not prove that the cost of the gratuities he accepted was passed on to the customer of the financial institution that made the payment. But, nothing in Section 2607(b) requires a specific showing by the prosecution that the unearned portion of the charge was passed on to the person who received the mortgage loan, much less that the person accepting the portion of the fee *knew* that this would be the case. Section 2607(b) bars the acceptance of an unearned portion of the charge "made or received" for the particular settlement service. Because, in the present case, the charge was made to and received from the federally insured financial institutions, it is sufficient (as was the case here) that these institutions paid the charge for the services. Whether the total cost of the payment was, in turn, passed on to others is irrelevant.

Congress's intent was to make illegal fee splitting and similar abusive practices that inflated settlement charges. The fact that the participant in such a scheme may not know who will ultimately bear the cost of his actions does not render the conduct less abusive or inflationary. Moreover, Congress reasonably could conclude that the inflation of charges for the particular settlement services in these and similar circumstances would be passed on to the ultimate

beneficiaries of RESPA—homebuyers—in the generality of cases, whether or not the payment could be traced to the homebuyer in any particular case.

In any event, as the court of appeals observed (Pet. App. 11a-12a) and petitioner concedes (Pet. 20), the government specifically established that the extra payments *were* passed on by the banks to the customers in many instances. Given this, the court below properly concluded that "when the evidence is viewed most favorably to the Government, *Glasser* v. *United States,* 315 U.S. 60, 80 (1942), it is a reasonable inference that the remaining payments also were passed on to the customers at least indirectly" (Pet. App. 11a). As the court of appeals further observed, there is no support in the language or legislative history for petitioner's argument that the government must prove that he knew that each payment was passed on to the bank's customers. But even if there were some scienter requirement in this regard, "[b]ecause the ultimate source of the bank's funds was its customers, a sense of realism alone should have informed [petitioner] that the customers would eventually bear the cost of the extra payments. * * * [T]his is sufficient to meet any degree of knowledge required under § 2607(b)" (Pet. App. 12a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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